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Supreme Court, U.S.
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No. 02-1514

IN THE

Supreme Court of the United States

MITCHELL R. SWARTZ,

Petitioner,

v.

SCHERING-PLOUGH CORPORATION, PLOUGH U.S.A., SCHERING-PLOUGH HEALTHCARE PRODUCTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The only question presented by this case is whether the First Circuit Court of Appeals properly affirmed the district court's order granting summary judgment to the Respondents on a simple state law breach of contract claim.

CORPORATE DISCLOSURE STATEMENT

Schering-Plough HealthCare Products, Inc. hereby discloses that it is wholly-owned by Schering-Plough Corporation.

Schering-Plough Corporation hereby discloses that its shares of stock are publicly held, that it has no parent corporation, and that there is no publicly-held company that owns ten percent or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 219 F.3d 31 and is reproduced at Petitioners' Appendix ("Pet. App.") 32 (Appendix A). The report and recommendation of the chief magistrate judge of the district court is reproduced at Petitioner's Supplemental Appendix ("Pet. Supp. App.") SA1-24. The district court endorsed the chief magistrate judge's report and recommendation "adopted" on November 28, 2001.

PROVISIONS AT ISSUE

Respondents respectfully submit that no constitutional provision, treaty, statute, ordinance or regulation is at issue.

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner Mitchell Swartz ("Dr. Swartz" or "petitioner") seeks review of a judgment of the Court of Appeals for the First Circuit, affirming an order of the federal district court for the District of Massachusetts granting summary judgment in favor of Schering-Plough Corporation and Schering-Plough HealthCare Products, Inc. (collectively, "Schering-Plough").

On January 29, 1999, Dr. Swartz commenced this action in federal district court with claims ranging from breach of contract and negligence to trademark infringement, violations of civil rights and RICO violations.

On March 26, 1999, Schering-Plough moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss all claims against it. On June 17, 1999, the district court dismissed all but one of Dr. Swartz's claims; all that remained was a state law claim for breach of contract. Petition for Certiorari at 2.

On October 1, 2000, Schering-Plough moved for summary judgment on the breach of contract claim. On September 27, 2001, the chief magistrate judge of the district court issued a 36-page report and recommendation, recommending that summary judgment enter for Schering-Plough (the "Report and Recommendation"). Petitioner's

Supplemental Appendix ("Pet. Supp. App.") SA1-24. Dr. Swartz filed two separate objections to the Report and Recommendation. *See, e.g.*, Pet. Supp. App. SA25-27.[1]

On November 29, 2001, the district court adopted the Report and Recommendation and entered summary judgment in favor of Schering-Plough.[2]

On December 30, 1999, Dr. Swartz filed a notice of appeal. On September 24, 2002, having determined that argument was not necessary, the First Circuit affirmed the district court's order without a separate opinion, stating: "We have carefully reviewed the record in this case, including the briefs of the parties. We affirm the grant of summary judgment essentially for the reasons given by the magistrate in his report and recommendation dated September 27, 2001." *See* Pet. App. 32 (Appendix A).

B. Factual Background

Respondents hereby incorporate herein, in their entirety, the Facts as set forth in the Report and Recommendation. Pet. Supp. App. SA2-4. Respondents further incorporate

1. In the version appearing in his Supplemental Appendix, Petitioner altered the original text of the Report and Recommendation in two ways. First, he added bold emphasis to certain portions of the text that did not appear in the original Report and Recommendation without noting that the emphasis is added. *See, e.g.*, Pet. Supp. App. SA2-3, SA-4. Second, he has made [sic] notations where he deemed the text to be in error. *See, e.g.* Pet. Supp. App. SA-24. Upon review, however, the Report and Recommendation appears to be otherwise accurately reprinted.

2. References in Respondents' brief in opposition to the district court's findings refer to the findings set forth in the magistrate's Report and Recommendation, as adopted by the district court.

herein in their entirety factual materials set forth in the Discussion portion of the Report and Recommendation. Pet. Supp. App. SA-6-8; SA-9-11; SA-12-15; SA-15-17; and SA-22.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied because this case presents no issue of federal law, the questions presented for review by petitioner are not properly before this Court, and the First Circuit correctly affirmed the district court's order granting summary judgment to Schering-Plough. The district court correctly stated and applied the standards for summary judgment and consideration of evidence on summary judgment as well as the state law breach of contract principles.

1. This case presents none of the indicia customarily utilized to identify a matter worthy of expenditure of this Court's resources. Dr. Swartz attempts to obfuscate this fact by spinning a story of a mistreated *pro se* plaintiff. Peeling away the rhetoric and mischaracterizations from the petition for certiorari reveals Dr. Swartz's petition for what it truly is: a request that this Court ignore the scope of the First Circuit's order and grant certiorari so that it may second-guess an entire case worth of discovery rulings, factual findings and motion practice, and review the federal district court's application of black-letter state law contract principles.

a. This case does not present an important Constitutional or federal statutory issue warranting review by this Court. Nor does it raise any conflict among the federal courts requiring resolution by this Court. *See* Supreme Court

Rules 10, 11. Indeed, this case presents no issue of federal law whatsoever. Despite that Dr. Swartz would have this Court undo every order entered against him in the district court, the only issue that the First Circuit ruled upon was whether the district court properly granted summary judgment in favor of Schering-Plough. At issue, therefore, is only the First Circuit's decision affirming the District Court order granting summary judgment to Schering-Plough on one claim – a straightforward state law breach of contract claim. *See* Petition for Certiorari at 2 ("The Complaint in the District Court involves breach of contract. . . ."). This Court is not in the business of reviewing the application of state law. *See* Supreme Court Rule 10.

The only rulings that even come close to involving federal law are: (i) the District Court's decision to strike Dr. Berlin's affidavit that contradicted his earlier sworn deposition and affidavit testimony and (ii) the District Court's ruling that summaries of testimony attached to Dr. Swartz's affidavit in opposition to summary judgment were inadmissible under Fed. R. Civ. P. 56(e) and could not be considered on summary judgment. Both decisions were discretionary evidentiary rulings as to what materials the court would consider in deciding a motion for summary judgment. Those decisions were reviewable by the First Circuit only for "clear abuse of discretion." *See Torres v. E.I. Dupont De Nemours & Company*, 219 F.3d 13, 21 (1st Cir. 2000) (quotations omitted). These are hardly the sort of important federal issues worthy of this Court's attention.

b. Furthermore, this case presents a dispute between Dr. Swartz and Schering-Plough, the outcome of which will not affect anyone other than the litigants themselves. While Dr. Swartz seeks to have this Court

reexamine the evidence considered and facts found by the district court on summary judgment, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See also* Sup. Ct. R. 10 ("certiorari is 'rarely granted' when the petition asserts 'erroneous factual findings.'").

2. Further review of the decision below is unwarranted because the First Circuit correctly affirmed the district court's grant of summary judgment in favor of Schering-Plough. Indeed, Petitioner does not even purport to raise any claim of error by the First Circuit. He instead retells the same story he told to the First Circuit, claiming numerous "errors" by the district court. The district court, in adopting the Report and Recommendation, appropriately exercised its discretion in excluding Dr. Berlin's affidavit and the summaries of testimony attached to Dr. Swartz's affidavit and correctly stated and applied the summary judgment standard under Fed. R. Civ. P. 56 and state law to the breach of contract claim.

(a) The district court properly exercised its discretion to strike the affidavit of Dr. Robert Berlin filed in support of Dr. Swartz's opposition to summary judgment.

(i) Though the petitioner attempted to raise an issue of material fact by offering an affidavit of his purported business partner, Dr. Robert Berlin that contradicted Dr. Berlin's earlier affidavit and testimony, after the motion for summary judgment was filed, the district court applied well-settled principles of law in the First Circuit and properly exercised its discretion to strike the affidavit.

The law in the First Circuit is settled that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994).

The district court examined and quoted Dr. Berlin's deposition testimony and the later-filed affidavit at length. Comparing the two, the court found that "Dr. Berlin's precise, detailed testimony in his affidavit contradicts his ambiguous, amorphous deposition testimony." Pet. Supp. App. SA-21. The court offered the following example:

> [A]t his deposition, Dr. Berlin had a "very vague" memory as to who allegedly sent the second package to Schering and that there was "some possibility" that he had done it. He also could not remember where that second package was purportedly sent. His testimony was that he thought that he "had to send a second sort of supporting something to someplace else," but that he did not "remember too well."
>
> By contrast, in his affidavit, Dr. Berlin states unequivocally that he himself sent out the second package to "the manager of new product ideas/ development" at Schering who thereafter "specifically acknowledged receipt of both packages and the materials from the S-B Group." Moreover, the second package was described as "includ[ing] the detailed written formula, actual

> product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation.

Pet. Supp. App. SA-21.

The district court also noted that the affidavit was offered only after Schering-Plough filed its motion for summary judgment, Pet. Supp. App. SA-19 (citing *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994)), and noted that "no explanation whatsoever has been forthcoming to explain the striking differences in Dr. Berlin's recollections." Pet. Supp. App. SA-21. The district court thus struck the affidavit because "it was clearly filed in order to raise genuine issues of material fact so as to avoid the entry of judgment as a matter of law." Pet. Supp. App. SA-21.

(ii) The district court also properly refused to consider certain "summaries of admissions" appended to Dr. Swartz's affidavit in support of his opposition to summary judgment. The court found that the "summaries," which "both quote[d] and characterize[d] portions of [the deponents'] testimony" were "inadmissible and, consequently, [could not] be considered in deciding " the motion for summary judgment. *See, e.g.*, Pet. Supp. App. SA-15 n.12 (citing Fed. R. Civ. P. 56(e)).

(b) The district court properly found that Dr. Swartz had "failed to produce any admissible evidence to show either that he or the S-B Group entered into a confidentiality agreement with Schering or that any Sun-Bug Documents were transferred to Schering pursuant to such a confidentiality agreement." Pet. Sup. App. SA-21.

The court examined the deposition testimony of each of Dr. Swartz's purported partners. The court first noted that the testimony of Ms. Solomon and Ms. Berlin, two of Dr. Swartz's three purported partners was "crystal clear and unequivocal. Swartz's statements and the allegations notwithstanding, neither of these members of the S-B group delivered Sun-Bug Documents and information to Schering, nor did they have any discussions about Sun-Bug with any representative of Schering." Pet. Supp. App. SA-8-9. The court also noted that Dr. "Swartz does not contend either that he delivered anything to Schering or that he had any conversations with any Schering representatives." Pet. Supp. App. SA-6.

The district court concluded that Dr. Berlin remained the only possible member of the S-B Group who could have entered into a confidentiality agreement with, and delivered documents to, Schering. Pet. Supp. App. SA-9. Examining the deposition testimony of Harry Solmson, the court found that "Somson [sic] denied every [sic] having received any documents, product samples or technology about Sun-Bug or any comparable sunscreen/insect repellant combination product from Dr. Berlin or anyone else." Pet. Supp. App. SA-11. He also testified that "he never referred Dr. Berlin to anyone at Schering to call about the proposed product." *Id.* Finally, Solmson asserted that "he never came to any agreement whatsoever with any member of the S-B Group regarding Sun-Bug or any comparable sunscreen/insect repellant combination product." *Id.* Having stricken Dr. Berlin's contradictory affidavit, filed after Schering-Plough filed its motion for summary judgment, the court found that Dr. Swartz had not produced admissible evidence to defeat summary judgment. Pet. Supp. App. SA-21.

(c) The district court went one step further to find that

> even if Dr. Berlin's affidavit were to be considered and genuine issues of material fact were found respecting the existence of a confidentiality agreement and whether Sun-Bug Documents were given to Schering pursuant to it, [Dr. Swartz's] claim must fail given the utter dearth of evidence produced to establish a breach.

Pet. Supp. App. SA-21-22.

The district court recalled that "the alleged confidentiality agreement purportedly had as its terms that (1) whatever information was given to Schering '. . . would be kept confidential' and that Schering '. . . would proceed with good faith licensing negotiations at any time they chose to produce a dual action sunscreen product.'" Pet. Supp. App. SA-22 (citing *Swartz*, 53 F. Supp. 2d at 103). The court found that "to succeed, Swartz [had] to submit evidence to demonstrate, or from which it can be inferred, that Schering utilized any information in the Sun-Bug Documents in their product." Pet. Supp. App. SA-23. The court concluded that the "absence of evidence that Schering did not keep whatever was transferred 'confidential' or that Schering used or incorporated any of the information contained in the Sun-Bug Documents in the Schering product is fatal to the claim of breach." *Id.*

As the preceding section demonstrates, the district court correctly stated and applied the law governing summary judgment and breach of contract and correctly exercised its discretion in making evidentiary rulings on materials

presented in opposition to summary judgment. The First Circuit affirmed the grant of summary judgment essentially for the reasons set forth by the district court.

There is no error in the First Circuit's order. Indeed, petitioner does not even attempt to point to any error on the part of the First Circuit, nor does he demonstrate a conflict between the decision below and a decision of this Court or any other court of appeals on the issues actually presented to the district court and the First Circuit. Rather, the petitioner argues that the summary judgment decision below somehow contravened an earlier order on Schering-Plough's motion to dismiss. Petitioner raises a litany of questions on appeal that have nothing to do with the underlying case, the decisions of the district court or the First Circuit, and which fundamentally rely on misstatements of facts and misapplications of law. None of the petitioner's arguments justify review by this Court of the First Circuit's decision, as discussed further below.

3. To the extent that the petitioner otherwise claims error in the orders of the First Circuit or the district court, the petitioner's arguments are unavailing.

(a) As petitioner acknowledges, the underlying case involved only a breach of contract claim. Arguments relating to the standards of review regarding whether two inventions are identical under 35 U.S.C. § 102 have nothing to do with the claim that Schering-Plough entered into a confidentiality agreement with Dr. Swartz or one of his purported partners.

(b) Dr. Swartz's petition for certiorari relies heavily on an argument that the "Court has not followed the standards of review established by Judge Young's Order and

Memorandum which accurately, precisely and substantively, discusses 'information' and not merely documents. . . ." Petition for Certiorari at 7. Not only is Dr. Swartz's argument factually inaccurate, but the order on Defendants' motion to dismiss does not control a ruling on summary judgment. First, the Report and Recommendation expressly discussed both documents and information. *See, e.g.*, Pet. Supp. App. SA-8, 11, 22-23. Second, the order to which Petitioner refers is an order dismissing all but the contract claim at the pleading stage of the underlying case. *See* Pet. Supp. App. SA-2-4. On a motion for summary judgment, as opposed to a motion to dismiss at the pleading stage, it is the admissible evidence that the court considers and not the allegations of the pleadings.

(c) The petitioner argues that summary judgment was inappropriately entered because he was not allowed sufficient discovery. At the time that Schering-Plough moved for summary judgment, a lengthy discovery period had closed. Dr. Swartz's argument is actually that he does not agree with the district court's rulings on discovery, including refusing to allow Dr. Swartz to misuse discovery devices to harass Schering-Plough and its employees.

(d) Dr. Swartz has never established any error or abuse of discretion by the district court or the First Circuit. Dr. Swartz apparently expects this Court to second-guess nearly every order entered against him in the district court. While petitioner claims bias in every single order that did not go his way, he points to nothing other than the outcomes of the motions themselves to demonstrate any alleged error, abuse of discretion, or bias. This is nothing new. Indeed, Dr. Swartz has, since the inception of the district court case, consistently and falsely accused Schering-Plough, its counsel

and the courts (including various, specific attacks on Chief Judge Young, Judge Gertner and Chief Magistrate Judge Collings of the district court, alleging numerous improprieties). The Petition for Certiorari is no exception.

For example, in objecting to the Report and Recommendation of Chief Magistrate Judge Collings, Dr. Swartz claimed that the Chief Magistrate did not handle the district court matter impartially, that he acted with "bias and prejudice," and that specifically with regard to the Report and Recommendation, "he was arbitrary and capricious." *See* Pet. Supp. App. SA-26; *see generally* SA-25-27. Dr. Swartz now weaves these very same unfounded rantings throughout his Petition for Certiorari, including allegations that Schering-Plough did not produce discovery and that the Chief Magistrate "covered up" Schering-Plough's failures to respond to discovery and "came back into the case to protect [Schering-Plough] and deny [Dr. Swartz] even the appearance of justice." Petition for Certiorari at 16. Never has Dr. Swartz been able to point to anything to back up his reckless assertions, and he does not do so now.

(e) Dr. Swartz attempts inappropriately to exploit his on-again, off-again *pro se* status. The simple fact, however, is that while Dr. Swartz proceeded *pro se* during much of the litigation, he was represented by counsel of his choosing as of the date of his deposition, August 22, 2000, throughout the summary judgment process, and in connection with his objections to the Report and Recommendation. *See, e.g.*, Pet. Supp. App. SA-27. Thus, not only are Dr. Swartz's attempts to gain advantage by reference to his *pro se* appearance improper and irrelevant, they are, for the purpose of attacking summary judgment, without factual basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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